IN THE SUPREME COURT OF THE UNITED STATES.

No. 1152.

THE HANOVER FIRE INSURANCE CO., OF N. Y., and THE CITIZENS' FIRE INSURANCE CO., OF N. Y.,

Plaintiffs in Error,

vs.

JOHN KINNEARD, W. H. WILLIAMS and SUSAN M. PHILLIPS,

Defendants in Error.

ERROR TO THE CIRCUIT COURT FOR THE DISTRICT OF KANSAS

MOTION BY DEFENDANTS TO DISMISS.

BRIEF FOR PLAINTIFFS IN ERROR,

BY

G. W. COTTERILL,
SHELLABARGER & WILSON,

BURGOYNE QUICK PRINTING CO., COR. WALKER & CENTRE, N. Y.

IN THE

Supreme Court of the United States.

THE HANOVER FIRE INSURANCE COMPANY OF NEW YORK, and THE CITIZENS' FIRE INSURANCE COMPANY OF NEW YORK, Plaintiffs in Error, AGAINST JOHN KINNEARD, W. H. WILLIAMS and SUSAN M. PHILLIPS, Defendants in Error.	No. 1152.

MOTION BY THE DEFENDANTS IN ERROR TO DISMISS FOR WANT OF JURISDICTION, BECAUSE THE MATTER IN DISPUTE, EXCLUSIVE OF COSTS, DOES NOT EXCEED THE SUM OR VALUE OF $5,000.

The plaintiffs in error in the above-entitled case now come and make the following statement in reply to the motion to dismiss for want of jurisdiction.

I.

The plaintiffs in error state, in the first place, that the statement found at the top of page 2 of the brief in support of said motion, where it is alleged :

" As the questions, evidence and counsel were the same in all the cases that Court ordered them, over the

objections of the plaintiffs in error, to be tried together before the same jury,"

is inaccurate and misleading in this, that it is not true, as there averred, that the evidence in the cases consolidated was or could be the same; and the three cases were not of "a like nature or relative to the same questions" within the sense of these words, as found in Section 921 of the Revised Statutes. This form of statement of the brief may possibly have been adopted for the purpose of avoiding the legal consequences of the rule settled by this Court in

Waterville vs. Van Slyke, 115 U. S., 290.
National Bank vs. Insurance Co., 100 U. S., 43,

and other like cases; which hold that:

"In order to get a decision on a motion to dismiss made before printing, the *motion papers* must present the case in a way which will enable the Court to act understandingly without reference to the transcript on file."

In the case of Waterville, the Court, after announcing the above rule, adds:

"In this case we have not been furnished either with a copy of the certificate on which the motion depends, or with an agreed statement of what it contains; in fact, there is nothing on which we can act, unless we go to the transcript."

So in the present case the motion furnishes the Court with nothing going to show that the cases below which were consolidated were "of a like nature" or "related to the same questions," or that the similarity of the cases was such that they could be consolidated "conformable to the usages of courts."

We, therefore, in resistance of this allegation in the

brief that the cases consolidated each depend upon the "same evidence," here resort to a condensed statement, derived from an inspection of the unprinted record, showing, generally, the character of the three cases.

The suit of John Kinneard, Lucia M. Laird, W. H. Williams, G. H. Embry and Susan M. Phillips against the Hanover Fire Insurance Company of New York and the Citizens' Fire Insurance Company of New York, Number 5575, was commenced in the District Court of Franklin County, Kansas, on the 10th day of March, 1885, and was founded upon a policy of insurance, made Exhibit A in the plaintiff's petition, alleging an insurance for $2,500, from the 30th day of July, 1884, to the 30th day of July, 1885, in favor of a certain partnership by the firm name of Kinneard & Laird.

The petition sets forth as the foundation of the action one of those long printed policies usual with insurance companies, containing a great multitude of conditions, the observance of every one of which was made vital to the validity of the policy, and avers compliance by the plaintiffs with all the conditions. It further avers that $1,800 of the $2,500 was on the fixed and movable machinery of the mill property; $200 on the boiler and engine, and $500 on the stock.

The answer in this case against the Hanover Fire Insurance Company of New York and the Citizens' Fire Insurance Company of New York denies generally the averments of the bill, and sets forth in full the application on which the policy was issued, containing the usual multitude of questions and answers, which are made part of the policy; avers the falsity of certain of the statements of the application, fraud, &c., making an exceedingly complicated and a great variety of special

defenses, totally different from the defenses made in the other consolidated cases.

Another of the three cases so consolidated was the case of John Kinneard, Lucia M. Laird, G. H. Embry W. H. Williams and Susan M. Phillips against the Phenix Insurance Company of Brooklyn, No. 5805. The original petition was filed in this case on the 21st of December, 1885, and amended on the 8th of February, 1886, and is on a policy of insurance dated July 30, 1884, made Exhibit A in the declaration, and insured the firm of Kinneard & Laird against loss to the amount of $2,500—$1,500 on the fixed and movable property; $200 on the boilers and engines; and $800 on the stock. This policy is also one of the printed policies, containing a vast number of conditions made vital to the policy, and these conditions are, in a large measure, different from those contained in the policy sued on in the other two cases. And it avers a compliance by the insured with all the various terms of the policy, and avers loss by fire as in the other case No. 5575.

The answer in this case against the Phenix Fire Insurance Company was filed on the 4th of February, 1886, and sets out an application to the Phœnix Company for a policy, the application being, as usual in such cases, long and containing a very large number of answers, made parts of the policy, &c. The answer sets up various breaches of the terms and conditions of the policy, these conditions being, as already remarked, in many cases quite different from those contained in either of the other policies, and the breaches and defenses set up are in a large number of the cases totally different from those set up in the other cases. And the defenses set up in this case were successful.

The third case so consolidated was commenced on the 10th of March, 1886, in the name of John Kinneard, Lucia M. Laird, W. H. Williams, G. H. Embry and Susan M. Phillips against the Western Assurance Company, of Toronto, Canada, No. 5576. This petition also declares on a policy dated July 30, 1884, covering the same period of one year; professes to make the policy an exhibit to the declaration, but the record does not set forth the exhibit.

The answer in this case of the Western Assurance Company of Toronto, Canada, sets up various breaches by insured of the terms of the policy, which are, in a large number of cases totally different from the defenses set up in the other two cases.

The cases were, on the motion of the defendant, transferred, on account of citizenship in different States, from the State Court to the Circuit Court of the United States for the District of Kansas. This was done in October, 1886.

On the 28th of November, 1887, the prosecution was dismissed as to Lucia M. Laird and G. H. Embry.

On the 12th of December, 1887, the following order and entry is made by the Court:

JOHN KINNEARD, W. H. WILLIAMS and SUSAN M. PHILLIPS, Plaintiffs, vs. THE PHŒNIX INS. CO., of Brooklyn, N. Y., Defendants.	No. 5575.
JOHN KINNEARD, W. H. WILLIAMS and SUSAN M. PHILLIPS, Plaintiffs, vs. WESTERN ASSURANCE CO., of Toronto, Canada, Defendants.	No. 5576.
JOHN KINNEARD, W. H. WILLIAMS and S. M. PHILLIPS, Plaintiffs, vs. HANOVER FIRE INS. CO., of N. Y., and THE CITIZENS' FIRE INS. CO., of N. Y., Defendants.	No. 5805.

The form of the order of consolidation reads:

"Now come the plaintiffs in the above-entitled action, by John W. Deford and W. Littlefield, their attorneys, and the defendant, by Jackson & Royse, their attorneys, and it appearing to the Court that the above-entitled actions are of like nature and relative to the same action, and to avoid unnecessary cost and delay, and that it is reasonable to do so, it is ordered by the Court that said actions be, and they are hereby consolidated for trial; to which order of consolidation each and every of the said defendants then and there excepted; and thereupon came a jury, to wit—(naming)—12 good and lawful men of the body of the District of

Kansas, who being duly empaneled and sworn to well and truly try the matters submitted to them in these actions, and true verdict give according to the law and evidence, and thereupon the trial of the case is proceeded with, and not being concluded at the time of adjournment the jurors are admonished by the Court as to their duties herein, and the further hearing postponed until to-morrow."

The next day, December 13, 1887, the trial of the case was adjourned until the 14th. On the 14th it was adjourned until the 15th, and the evidence was concluded and the case submitted to the jury.

On the 16th of December, 1887, the jury returned verdicts as follows:

JOHN KINNEARD, W. H. WILLIAMS and SUSAN M. PHILLIPS, Plaintiffs, vs. PHŒNIX INSURANCE COMPANY OF BROOKLYN, NEW YORK, Defendants.	December 16, 1887. No. 5575.

Now come the parties herein, same as on yesterday, and the juries empaneled herein being called, and all being present, rendered their verdict herein in the words and, figures following, to wit:

John Kinneard *et al.* vs. Phœnix Insurance Company of Brooklyn, New York, No. 5575; we the jury in said entitled action find for the defendant. P. H. Moore, foreman.

It is therefore, ordered and adjudged by the Court that the said defendant go hence without delay and have and recover of and from the plaintiffs herein, its costs in this action expended, and that execution issue therefor.

JOHN KINNEARD, W. H. WILLIAMS and SUSAN M. PHILLIPS, Plaintiffs, vs. THE WESTERN ASSURANCE COMPANY OF TORONTO, CANADA, Defendants.	December 16, 1887. No. 5576.

Now come the parties herein, same as on yesterday, and the juries empaneled herein being called, and all being present, render their verdict herein in the words and figures following, to wit:

John Kinneard *et al.*, No. 5576, vs. Western Assurance Company of Toronto, Canada; we, the jury in said entitled action, find for the plaintiffs and assess their damages against the defendant at the sum of $1,847.88. P. H. Moore, foreman.

JOHN KINNEARD, W. H. WILLIAMS and S. M. PHILLIPS, Plaintiffs, vs. HANOVER FIRE INSURANCE COMPANY OF NEW YORK and CITIZENS' FIRE INSURANCE COMPANY OF NEW YORK, Defendants.	December 16, 1887. No. 5805.

Now come the parties herein, same as yesterday, and the juries empaneled herein being called and all being present, render their verdict in the words and figures following, to wit:

"John Kinneard *et al.*, No. 5805, vs. The Hanover Fire Insurance Company of New York; we, the jury in said entitled action, find for plaintiffs, and assess their damages against defendants at the sum of $2,067.32. P. H. Moore, foreman."

Motion for a new trial was made December 16, 1887, in said case No. 5575, and assigns for error :

1. Misconduct of jury.

2. Irregularity in the proceedings of the jury preventing a fair trial.

3. Verdict not sustained by sufficient evidence, and contrary to law.

4. Newly discovered evidence.

5. Errors of law occurring during the trial and excepted to.

Similar motion was made in the case against the Canada Company, and both motions were overruled.

It is thus made palpable by an inspection of the record that it is not only not true, as stated in the opposing brief, that the three cases depended each upon the same evidence, but, on the contrary, the three suits were

(*a*) Each respectively based upon an entirely distinct title or cause of action against each defendant, each of such titles having no manner of connection with the other two.

(*b*) That said titles or policies, although on portions of the same mill property, were not each on the same property.

(*c*) That the terms and conditions of each policy were, in a large measure, radically different.

(*d*) That the applications for the policies were dissimilar, distinct and independent of each other.

(*e*) That the breaches set up by the defendants, respectively, were radically different, and independent, and

(*f*) Hence that the evidence required, in behalf of

each defendant, respectively, was in a large measure, if not wholly, distinct, different and independent.

In other words, an inspection of this record makes it notorious that the three cases were, both as to the grounds of action or title set up, and as to the defenses made, as independent and different from each other as any three cases ever were, which were founded upon independent contracts; except only that they were suits (though originally in favor of different plaintiffs afterwards made to be) in favor of the *same* plaintiffs, and except, also, that they were suits for losses caused by the *same* fire.

II.

The next point in this statement is this, that the foregoing analysis of the record shows that the cases consolidated were so totally different from each other, both as to the title set up, and as to the defenses involved, as to take the cases outside of all discretion and power given, by said Section 921 of the Revised Statutes, to consolidate.

It is true now as it was when it was stated in Judge Conkling's Treatise (page 386), that "the precise nature and extent of the authority" (to consolidate under Section 921), "here conferred does not appear to have been determined by judicial exposition." Section 921 confines the right of consolidation to cases that are of "*like nature and relative to the same questions:*" and *further* confines this right to consolidate, even in cases of like nature, to cases where the consolidation would be "*conformable to the usages of Courts.*" In

England this right of consolidation "is applicable only to cases brought by the *same* plaintiff against the *same* defendant for causes of action which may be joined. See 2d Sellon's Practice (Dublin Edition of 1796), page 229;" also Conkling's Treatise, 386, where the author thinks the power to consolidate is wider in America than in England.

Consolidation is defined by Bovier to be "An order "of the Court requiring a plaintiff to join in one suit "several causes of action against the *same defendant*, "which may be so joined consistently with the rules of "pleading but upon which he has brought distinct "suits."

According to the practice at common law, there was no such thing as consolidation except by ordering one or more cases to abide the event of another, and the rule was laid down in New York as follows:

"Where several causes, in favor of the same plain-"tiff, though against different defendants, concerning "the title to property, depend upon the same ques-"tions and the same evidence, either party may move "that only one of the causes be tried; and that the "others abide the event; and if the fact, that the ques-"tions and evidence are the same in all, be not dis-"puted by affidavit, the motion will be granted."

Jackson vs. Schauber, 4 Cowen, 78.

III.

These suggestions have brought us to the next point, to which we beg attention, namely, to the question,

whether a consolidation of two or more distinct, independent and dissimilar cases, where the consolidation is (here adopting the words of Section 921), not "conformable to the usages of Courts," and where, in the trial by the jury these dissimilar and independent cases were "bunched" for the purpose of one trial, is such a trial as to involve mere error, or, whether on the other hand, the error is one so radical as to make the trial mere "violence," and not due process of law?

To illustrate and enforce what we here mean by this last point: Suppose a case which is little, if any, more extreme than what did occur in the said order of consolidation now under consideration, where the order was to consolidate an action on a covenant of warranty, an action for a breach of promise of marriage, and an action upon a policy of insurance, like this Hanover policy, the order of consolidation being made because of the supposed similarities in the three cases, to wit, that all were actions *ex contractu*, and all were actions by the *same* plaintiff.

Now, the dissimilarity of the three actions and of the questions arising thereon in these supposed cases are not, in principle, greater than the dissimilarity of the three cases sued on in the present case, or than the dissimilarity of the defenses set up. And in the case just supposed the points of resemblance are substantially the same as in the cases at bar, the only similarity of the three cases at bar being that the plaintiffs became the *same*, and the three cases were *on contracts*, but on contracts differing from each other about as widely as the difference between the promise of marriage and the covenant of warranty.

Our present point we may state in another form of words, by turning to the inquiry what, in the way of a trial, is a good jury trial, and, as such, "due process of law?" To avoid alarming the Court at prospect of counsel entering upon a discussion of the question "what is due process of law," (a thing which this Court has more than once indicated that nobody can find out. Davidson vs. N. O., 96 U. S. R., 103–104; Hurtado vs. California, 110 U. S., 536; Hagar vs. Dist., No. 108–111 U. S., 707–708).

But whilst it is true that it is unsafe either to attempt a "definition" of "Due process of Law," or for counsel to enter upon a discussion of what that means, yet we think there are, even yet, a few departures from law, in the administration thereof, of which it can still be safely said they are not "trial by jury" nor "due process of law."

The authorities we now turn to are, therefore, not resorted to in an attempt to either discuss or define "due process of law," but are resorted to for the more permissible purpose of showing that if a group of common law jury cases which are as unlike to each other, both as to the cause of action and the defenses set up, as divers civil cases can be, are arbitrarily thrown into hotchpot, and are tried, by the jury together, then, whatever else may be "due process of law," this proceeding, at least, is not such.

On this general subject Cooley Con. Lim., s. page 355, says:

"Every man has a right to require that his own controversy shall be judged by the *same rules* which are applied in a controversy of his neighbours."

To the same effect is the following from the same author (side pages 391–392):

"Every one has a right to demand that he be governed by *general rules*, and a *special* statute which, without his consent, singles his case out as one to be *regulated by a different law* from that which is applied to all similar cases would not be legitimate legislation, but would be such an arbitrary mandate as is not within the province of free government."

To the same effect is the quotation on the same page, in note 2, from Lewis vs. Webb, 3 Maine, 326, where the Court says:

"On principle it can never be within the bounds of legitimate legislation to enact a special law or pass a resolve"—(in this case make an order of consolidation)—"*dispensing with the general law in a particular case*," &c.

To the same effect, namely, that nothing can be "due process of law" which deprives one man, in a common law trial, of the rights which the general law of the land attaches to all such trials, is that definition by Mr. Webster of "due process of law," which has been expressly sanctioned by this Court, and which Mr. Cooley approves as one more frequently adopted by Courts than any other in existence (Const. Lim., side pages 353–354). This definition by Mr. Webster is as follows:

"By law of the land is most clearly intended the *general law;* a law which hears before it condemns; which proceeds upon inquiry and renders judgment only after trial. The meaning is that every citizen shall hold his life, liberty and immunities under the protection of *general rules* which govern society. Everything which may pass under the form of an enactment is not, therefore, to be considered the law of the land."

And this Court, in the case of Hurtado vs. California,

110 U. S., 535, 536, in approving this definition by Mr. Webster, uses the following language, here most apt and appropriate:

"Law is something more than mere will exerted as an act of power. It must not be a *special* rule for a *particular person* or a *particular case*, but, in the language of Mr. Webster, in his familiar definition, 'the general law, a law which hears before it condemns, which proceeds upon inquiry, and renders judgment only after trial,' so 'that every citizen shall hold his life, liberty, property and immunities under the protection of the general rules which govern society,' and thus excluding, as not due process of law, acts of attainder, bills of pains and penalties, acts of confiscation, acts reversing judgments and acts directly transferring one man's estate to another, legislative judgments and decrees, and other similar *special*, *partial* and *arbitrary* exertions of power under the forms of legislation."

A *statute* which directs that a common law trial should be so conducted as to deprive a party of those processes, proceedings, rights of challenge, rights to have his independent issue separately heard and tried, rights to deliver in his own evidence unmingled with other trials, all of which, by the *general law of the land*, are secured to all other citizens and suitors in all like cases, is not due process of law.

And surely, if it would be incompetent for the *Legislature* to enact a law so depriving a citizen of the ordinary rights of common law trial, as these are in like cases secured to other citizens, then *a fortiori*, would it be incompetent for the Court to consolidate by an *order of consolidation*.

Another class of authorities here pertinent is found in such decisions as that of the

Bank of Hamilton vs. Dudley, 2 Peters, 492;

which held that the law of Ohio directing that a commission instead of a jury appraise property taken for public use is not constitutional, nor due process of law.

So another class of cases here appropriate is to be found in the law as laid down in Hodges vs. Easton, 106 U. S., 408, where this Court held that, in a jury trial, the Court could not submit *part* of the facts to the jury and *itself* determine the remainder of them, and yet this be, in law, a jury trial. The Court on this point (at the bottom of page 412) says:

> " It has been often said by this Court that the trial by jury is a fundamental guaranty of the rights and liberties of the people, and consequently every reasonable presumption should be indulged against its waiver."

In the same spirit and to the same effect is the language of the Court in Boyd vs. The United States, 116 U. S., 635, where the rights secured by the 4th and 5th amendments were under consideration. There the Court (page 635) says:

> " It is the duty of the Courts to be watchful for the constitutional rights of the citizens and against any stealthy encroachments thereon. Their motto should be *obsta principiis*."

So it is to be again observed that any step in the progress of a trial tending to deprive the party of a decision by the jury on every question of fact, and to which decision, by the general or common law the party was entitled, destroys the validity of the trial, and renders it no " trial by jury." This is so held in Baylis vs. Travellers Insurance Co., 113 U. S., 321.

There the Court ordered a verdict for the plaintiff subject to the Court's opinion whether the facts proved

were sufficient to make defendant liable, and the Court rendered judgment for defendant on its *own estimate* of the effect of the evidence. This Court there held the party had been deprived of a jury trial, and concludes the opinion of the Court in these words:

"The right of trial by jury in the Courts of the United States is expressly secured by the 7th Article of Amendment to the Constitution, and Congress has by statute provided for the trial of issues of fact in civil courts without intervention of a jury, only when the parties waive their right to a jury by stipulation in writing. Revised Statutes, Sections 648–649."

This constitutional provision this Court has always guarded with jealousy.

Elmore vs. Grimes, 1 Peters, 469.
De Wolf vs. Rabaud, 1 Peters, 476.
Castle vs. Bullard, 23 Howard, 172.
Hodges vs. Easton, 106 U. S., 408.

So again it is to be observed that a jury composed of less than twelve men is not the constitutional jury, and a trial by less than twelve is not "due process of law." On this point Cooley's Const. Lim. says (side page 319):

"The infirmity in case of a trial by jury of less than twelve would be that the tribunal would be one unknown to the law," &c.

This is decided in

2 Ohio State, 298.
18 New York, 128.
8 Blackford, 561.
16 Michigan, 351.

We now state what we regard as the *direct* point raised by this action of the Court in ordering a jury to decide upon three quite distinct and independent cases

in one trial. Our point is this: That compelling these defendants to submit to this method of trial which is not tolerated by the general law of the land in regard to the trial of like cases generally, is such flagrant departure from "those rules and principles which have been established by our jurisprudence for the protection and enforcement of private rights," as to deprive such trial of the recognized qualities and forces of a "trial by jury;" and that, hence, the judgment rendered in the case is a judgment rendered in absence of a "trial by jury" and is *coram non judice*, and void.

This Court has, whilst refusing to give a definition of due process of law of universal application, repeatedly laid down principles which establish that this trial, by "bunching" utterly dissimilar and independent cases for the purposes of one trial, is not "a course of legal proceeding according to those rules and principles which have been established, by our jurisprudence, for the protection and enforcement of private rights."

These words last quoted are from Pennoyer vs. Neff, 95 U. S., 715, last paragraph of syllabus. In that case the Court held the law of Oregon to be against the constitutional provision securing jury trial and due process of law, which was construed as tolerating a *personal* judgment against an absent and unserved defendant for the excess of an alleged debt above the attached property. And the review of this matter of due process of law found in Justice FIELD'S opinion in this case is elaborate and valuable.

We have now seen that any common-law jury case which is not conducted in accordance with "those rules and principles which have been established by our jurisprudence for the protection and enforcement of private

rights," and which proceeding is, in essential respects, *special* and *peculiar*, and such as the law does not tolerate in the trial of *like cases* as applied to the body of the people generally by the general laws of the land, is held to not be "due process of law."

Few cases state this more emphatically than Hurtado vs. California, 110 U. S., 535–536, where this Court approved the definition, made by Mr. Webster, of due process of law, as already quoted. There the Court holds that the law providing for the trial "must *not be a special* rule for a *particular person or a particular case*," and expressly states that all laws and proceedings thereunder which are "partial" in their operation are excluded from the class of proceedings which are "according to due process of law."

But counsel cannot do better in regard to the present point, insisting that every citizen is entitled, by the rule securing the due process of law, to be tried by the general law of the land applicable to *like cases*, and not by *special, exceptional and arbitrary modes of proceeding*, than to go back to that great leading case of Murray's Lessee vs. Hoboken, 18 Howard, 272, 276, 280, and to which this Court, in all cases involving "due process of law," incessantly go back, as furnishing the most complete and exhaustive discussion of the subject which is to be found in American jurisprudence. There the Court, after saying "that it is manifest that it was not left to the legislative power to enact *any* process which might be devised," and that this article regarding due process "is a restraint on the *legislative* as well as the executive and *judicial* powers of the Government," proceeds to give a compact and exact statement of what is "due process of law,"

as applied to all common law actions, as distinguished from those proceedings of a summary and public nature in favor of governments, and the like where by the common law, trial by jury was not a matter of right. And this is the definition we here invoke. It is in the following words (18 Howard, 280) :

"Due process of law generally implies and includes *actor, reus, judex,* regular allegations, opportunity to answer, AND A TRIAL ACCORDING TO SOME SETTLED COURSE OF JUDICIAL PROCEEDINGS." To this is cited by the Court :

2 Institutes, 50.
4 Dev., 15.
4 Hill, 146.
2 Yerger, 260.
Id., 159.
10 Yerger, 59.
1 Curtis, 311.

The cases relating to common law jury trials invariably and incessantly come back to this definition that nothing is "due process of law" in judicial administration which does not secure to the party on trial "a trial according to some settled course of judicial proceedings in like cases." And we conclude this head of the case by submitting that, in the whole history of jury trials from the beginning of the common law until now, we have not found a case where it was ever held that "*bunching*" into one jury trial a group of utterly dissimilar, incongruous and independent jury cases, was either within the power of consolidation or was according to the "settled course of judicial proceedings," established for jury trials, in

countries controlled by the common law, and by bills of rights securing "due process of law."

And on what has now been presented we submit that the judgment rendered in this case was a judgment without any constitutional verdict; and the case is brought within the law as laid down in such cases as

Ex parte Rolfs, 30 Kansas, 758,

where, in a case where the party was entitled to a jury trial and was denied it, it was held to be not a mere irregularity or mere error, but a case where the judgment was void.

IV.

But suppose we are wrong in this and that the order to consolidate these cases presents a case of *mere* error where the judgment is valid until reversed on error, then our next proposition is that this is one of the errors provided for in subdivision 4 of Section 699 of the Revised Statutes, where the writ of error is allowed to review the judgment without regard to the sum in dispute.

In submitting this point counsel do so with some hesitation growing out of what this Court has decided in the case of

Bowman vs. Railway Company, 115 U. S., 611.

But we submit that the case at bar is not analogous to this case of Bowman against Railway Company, because there the Court held that the right of which the party complained of having been deprived was not a right secured by the constitution, but by the common

law applicable to carriers. In the present case the deprivation complained of is clearly and purely a constitutional right secured to the plaintiff in error, to wit, the right to a jury trial according to the established rules regulating jury trials ; or, in other words the right to " due process of law."

In order to hold that this is not a case reviewable under subdivision 4, Section 699, this Court must hold that the judgment rendered in a jury trial case, and where the jury was *not* waived, but was insisted upon, cannot be reviewed in this Court, unless the amount of the judgment exceeds $5,000.

This is not a case, as in the case of the Anarchists (123 U. S., 181, and in the case of Brooks vs. Missouri, 124 U. S., 397) where the complaint was that in the trial below the rulings were such as to deprive the parties defendant of an impartial jury trial, and where the Court refused to review these matters of complaint, because, in the Court below, this claim of deprivation of right was " not set up or claimed," and, therefore, was not reviewable in this Court.

In the present case this right to the impartial jury trial was expressly and distinctly " set up," both in the resistance, by the plaintiff in error, to the order of consolidation, by exceptions reserved thereto, and by a motion for a new trial, which was overruled, on the ground of this erroneous ruling in making the consolidation.

V.

We conclude this statement by calling attention of the Court distinctly and carefully to the fact that this argument is not submitted as a full discussion of the matters involved in this record. All that we have gone over has been done for the purpose of bringing to the Court's attention the fact that the present case is one coming within the decision of the Court in the case of

Waterville vs. Van Slyke, 115 U. S., 290.

holding, as above quoted, that in order to secure the dismissal of a case, on motion, before the record is printed, the motion must present a case in a way which will enable the Court to act understandingly *without reference to the transcript on file.* It is impossible, as it seems to us, for this Court to hold that any and every case can be consolidated under Section 921. The express letter of Section 921, as already remarked, not only requires that the cases must be like cases and questions must be "alike," which are involved in the cases capable of consolidation, but they must be so exactly similar or alike as that the order for consolidation will be an order "*conformable to the usages of courts.*"

If this Court shall decide that it is unnecessary for the Court to see the printed record, it will, we submit, be equivalent to saying that the character of the cases is immaterial and that it is within the *discretion* of the Court to order *any* and *all* cases to be consolidated; and that such consolidation, for example, of an action for seduction with an action of ejectment would be proper if the *discretion* of the Court below so held.

For this Court to shut its eyes to the character of this record is to hold that such a jury trial would be a good jury trial and due process of law; and that this Court could not review a judgment based on such a verdict unless the judgment exceeded $5,000.

For this reason we submit that whether we are right or wrong in some of the points of this discussion, yet the case is one where the motion to dismiss cannot be successful *in the absence of the printed record*, because the Court cannot know the full extent of the *dissimilarities in the title and in the defenses involved in the cases consolidated.*

G. W. COTTERILL,
SAM'L SHELLABARGER and
J. M. WILSON,
For Plaintiffs in Error.

Office Supreme Court U. S.
FILED.
DEC 16 1898
JAMES H. McKENNEY,
CLERK

IN THE

SUPREME COURT

OF THE UNITED STATES.

NO. 1152.

THE HANOVER FIRE INSURANCE CO., OF N. Y. AND THE CITIZENS FIRE INSURANCE CO., OF N. Y., PLAINTIFFS IN ERROR.

VS.

JOHN KINNEARD, W. H. WILLIAMS AND SUSAN M. PHILLIPS, DEFENDANTS IN ERROR.

Error to the Circuit Court for the District of Kansas.

Brief in Support of Motion to Dismiss for Want of Jurisdiction.

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G. W. Cotterill,
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STATEMENT.

Three suits were pending in the lower court, brought by the defendants in error—one against The Phœnix Insurance Co., another against The Western Assurance Co., and the third against the plaintiffs in error, upon their respective policies, on the Forest Mills, at Ottawa, Kansas, which were destroyed by fire July 13th, 1885, to recover for that loss. Each of said policies was for $2,500. These three cases came on for trial, in the Circuit Court, in De-

cember, 1887. As the questions, evidence and counsel were the same, in all the cases, that court ordered them, over the objection of the plaintiffs in error, to be tried together, before the same jury. This was done. The jury returned three verdicts, (1) in favor of The Phœnix Co., (2) against The Western Assurance Co., for $1,847.88, and (3) against the plaintiffs in error for $2,067.32. Motions for new trials were overruled in all the cases, and judgments entered on the verdicts.

The foregoing facts are shown by the record.

The plaintiffs in error, as we are advised, bring the case here, on the ground, that, the court below having refused them a separate trial, and compelled them to go to trial to the same jury, and at the same time, with the other two cases, they have a right to a writ of error, without regard to the amount in dispute, under Sec. 699, subdv. 4, U. S. Rev. Stats.

POINTS AND AUTHORITIES.

1. Sec. 699, subdv. 4, has no application to this case. It is not a suit "brought on account of the deprivation of any right, privilege or immunity secured by the constitution of the United States, or of any right or privilege of a citizen of the United States."

(2) The Circuit Court had the power under Sec. 921, U. S. Rev. Stats., to order the three cases to be tried together, to the same jury. Weide v. Ins. Co., 3 Chic. Legal News, 352; Keep v. Ry. Co., 10 Fed. Reporter, 454, and C. C.

(3) Even if the Circuit Court ought to have granted plaintiffs in error a separate trial, its refusal to do so was only an error, which this court has no power to correct; the amount in dispute being too small to give it jurisdiction.

Wherefore, as this writ of error was taken, in violation of Sec. 691, U. S. Rev. Stats., we ask that it be dismissed, at cost of plaintiffs in error.

A. J. BENTLEY,
JOHN W. DEFORD,
W. LITTLEFIELD,
Attorneys for Defendants in Error.

OTTAWA, KANSAS,
Nov. 15th, 1888.